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In the Supreme Court of the United States

OCTOBER TERM 1969

No. ~~1970~~ 75

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

JONATHAN TODD BYERS,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of California

Brief for the Petitioner

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No. 1070

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On Writ of Certiorari to the
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Brief for the Petitioner

OPINIONS BELOW

The opinion of the Supreme Court of the State of California is reported at 71 A.C. 1083, 80 Cal.Rptr. 553, and 458 P.2d 465 (September 16, 1969). It is also set forth in its entirety in the Appendix at pages 58-84.

JURISDICTION

The Supreme Court of the State of California entered judgment in this case on September 16, 1969. A timely petition for rehearing was filed on October 1, 1969. On October 15, 1969 the Order Denying Rehearing was filed. The jurisdiction of this Court is invoked under Title 28, United States Code section 1257(3).

QUESTIONS PRESENTED

1. Does the requirement imposed by a state "hit-and-run" statute that a driver involved in an accident resulting in property damage must stop and identify himself violate the Fifth Amendment privilege against self-incrimination?

2. Is it necessary to bar the use of the information derived from compliance with section 20002 or its fruits as evidence in any criminal proceeding in order to sustain the constitutionality of the statute?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case presents the applicability of the Fifth and Fourteenth Amendments of the Constitution of the United States to the provisions of section 20002(a) of the California Vehicle Code. The pertinent constitutional and statutory provisions are set forth herein and in Appendix A of our brief.

STATEMENT OF THE CASE

A. Lower State Court Proceedings.

On August 22, 1966, a two-count criminal complaint was filed in the Mendocino County Justice Court for the Ukiah Judicial District in California, charging the respondent Jonathan Todd Byers with two misdemeanor violations of the California Vehicle Code. Count one of the complaint

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1. Section 21750 provides: "The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left at a safe distance without interfering with the safe operation of the overtaken vehicle, subject to the limitations and exceptions hereinafter stated."

charged Byers with improper and unsafe driving in violation of section 21750 of the Vehicle Code.[1] Count two charged that he violated section 20002(a) of the California Vehicle Code (failure to stop at the scene of an accident resulting in property damage) (A. 7, 12-13).[2]

Byers filed a demurrer to Count two of the complaint (A. 14-17). He claimed, *inter alia*, that section 20002(a) was unconstitutional on its face and as applied because it violated the privilege against self-incrimination guaranteed by both the federal and state constitutions (A. 8, 14-17). It was stipulated by counsel that both charges contained in the complaint arose from the same accident (A. 8-9). On December 7, 1966, the Justice Court overruled the demurrer (A. 8-9).

On January 13, 1967, Byers filed a petition for writ of prohibition in the Mendocino County Superior Court (A. 7-25). In the Superior Court Byers again urged that the privilege against self-incrimination barred his prosecution under Count two. He contended that compliance with the "hit-run" provisions of section 20002(a) violated the privilege against self-incrimination when he was also charged

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2. At the time of the accident section 20002, subdivision (a), provided: "The driver of any vehicle involved in an accident resulting in damage to any property including vehicles shall immediately stop the vehicle at the scene of the accident and shall then and there either: (1) Locate and notify the owner or person in charge of such property of the name and address of the driver and owner of the vehicle involved, or; (2) Leave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver and of the owner of the vehicle involved and a statement of the circumstances thereof and shall without unnecessary delay notify the police department of the city wherein the collision occurred or, if the collision occurred in unincorporated territory, the local headquarters of the Department of the California Highway Patrol. Any person failing to stop or to comply with said requirements under such circumstances is guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in the county jail for not to exceed six months or by a fine of not to exceed five hundred dollars ($500) or by both."

In 1967 this section was amended in several minor respects not pertinent to this case.

with another criminal offense arising from the same accident (A. 9). On February 17, 1967, the Superior Court issued an opinion in support of the writ of prohibition sought by Byers (A. 36-45). The Court held that section 20002(a) could not be applied against Byers without violating the privilege against self-incrimination under the Fifth Amendment of the Constitution of the United States. Accordingly, on March 21, 1967 the Court issued a Permanent Writ of Prohibition to restrain further proceedings in the Justice Court on Count two of the Complaint (A. 3).

B. State Appellate Proceedings.

On March 2, 1967 a notice of appeal was filed in the California Court of Appeal (A. 57). The Court of Appeal reversed the decision of the Superior Court and held that enforcement of the "hit-run" statute against Byers was not barred.[3] However, in reaching that decision the Court of Appeal held that the Fifth Amendment privilege against self-incrimination was infringed by a requirement that a driver involved in an accident must stop and identify himself in any case where he was later charged with a criminal offense arising from the accident. The rationale of the Court's decision was that compliance with section 20002(a) would require Byers to admit that he was the driver who passed unsafely in violation of section 21750. Nevertheless, the Court of Appeal also held that compliance with section 20002(a) could be constitutionally justified if admissions made in compliance with the statute were not later used in evidence. Accordingly, by adoption of the theory of "use-restriction" the Court upheld enforcement of the statute.

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3. That opinion which is not reported in the permanent volumes of the Official California reports is nevertheless set forth at 265 A.C.A. 1031, 71 Cal.Rptr. 609 (1968).

Both the People of the State of California and the respondent Byers filed a Petition for Hearing in the California Supreme Court. On November 20, 1968, the Court granted a hearing on the matter. Following briefing and argument, the Supreme Court on September 16, 1969 issued its opinion affirming the decision of the Superior Court and holding that enforcement of the statute against Byers was barred (A. 58-84). In reaching that decision, the Supreme Court concluded that compliance with section 20002(a) was the mandatory duty of all drivers in California. However, the Court also held: (1) that the Fifth Amendment privilege against self-incrimination was applicable to the requirements of section 20002(a). The Court stated that:

> "We are satisfied that the privilege is applicable when a driver involved in an accident is confronted with a statutory requirement to stop and divulge his identity and reasonably believes that compliance with the statute will result in self-incrimination" (A. 66).

However, the Court also held: (2) that compliance with the statute could be sustained if no use were made of the required information or its fruits in connection with any criminal proceeding. The Court stated that:

> ". . . we must, in order to fulfill our responsibility to protect the privilege against self-incrimination, hold that where compliance with section 20002 of the Vehicle Code would otherwise be excused by an assertion of the privilege, compliance is, as in other cases, mandatory and state prosecuting authorities are precluded from using the information disclosed as a result of compliance or its fruits in connection with any criminal prosecution related to the accident." (A. 79).

Finally, the Court also held: (3) that since, at the time of the accident, Byers could not reasonably have anticipated the Court's decision precluding from use information divulged in compliance with section 20002 or its fruits in

circumstances where the driver would otherwise be constitutionally privileged not to comply, "fairness" dictated that Byers should not be punished for his failure to comply with the statute (A. 79-82). Accordingly, the Court held that prosecution under Count two of the Complaint was barred (A. 82).

SUMMARY OF ARGUMENT

I

In the decision below the California Supreme Court held that all motorists in California must comply with section 20002(a). Under this statute it is a misdemeanor offense for any driver involved in an accident resulting in property damage to leave the scene of the accident without stopping to identify himself or to otherwise comply with the duties imposed.

The State Supreme Court was correct in holding that all motorists must comply with section 20002(a). A requirement of this kind is based upon humanitarian interests and serves to protect against financial loss. All 50 states and the District of Columbia require a driver involved in an accident to stop and identify himself. The Uniform Vehicle Code also imposes this kind of duty.

However, the Court below erred when it also held that compliance with section 20002(a) violates the Fifth Amendment privilege against self-incrimination in any case where the driver reasonably believes that compliance will result in self-incrimination. In holding that the privilege against self-incrimination applies to even the minimal duty imposed upon a driver to stop and to identify himself, the Court created an "extravagant extension of the Fifth Amendment". *Holt v. United States,* 218 U.S. 245, 252-253 (1910), *United States v. Wade,* 388 U.S. 218, 222 (1967).

II

The privilege against self-incrimination does not apply to a requirement that a driver involved in an accident resulting in property damage must stop and identify himself because:

(1) Compliance with such a requirement does not constitute a substantial hazard of self-incrimination;

(2) A requirement to stop and to identify oneself is non-testimonial in nature; and

(3) Compliance with the "hit-and-run" statute does not undercut the values upon which the privilege against self-incrimination rests.

III

The Court below appeared to rely on this Court's decisions in *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965); *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); and *Haynes v. United States*, 390 U.S. 85 (1968). However, the Court extended the holdings of those cases beyond anything ever suggested in those decisions. Those cases presented statutory schemes calculated to secure convictions by directing registration requirements to persons "inherently suspect of crime" in "areas permeated with criminal statutes". Compliance with section 20002 does not begin to approach this kind of situation.

On the contrary, the *Marchetti-Grosso-Haynes* cases make clear that information which is general in nature and acquired in the course of a non-criminal regulatory program may be obtained and used in a criminal proceeding without infringing the privilege against self-incrimination. Thus, the Court was careful to distinguish the case of *United States v. Sullivan*, 274 U.S. 259 (1927), requiring an income tax return to be filed even if the income was earned illegally

and *Shapiro v. United States*, 335 U.S. 1 (1948), embodying the required records doctrine.

IV

Assuming arguendo that the privilege against self-incrimination does apply to the requirement that a driver must stop at the scene of an accident and give his name and address, the state has an overriding and compelling interest both in requiring compliance with its "hit-and-run" statute and in enforcing its criminal laws.

The difficulty in proving "untainted" evidence in a "hit-and-run" case where compliance must be achieved on the spot, if at all, is so great and the information as to a driver's identity so general in nature, that the state ought not to be precluded from using that information or the fruits of that disclosure in any criminal proceeding. The effect of the Court's decision is to automatically immunize the criminal conduct of a driver. If self-incrimination is involved in requiring a driver to stop and identify himself, use of the information acquired is a price that must be paid for the orderly use and safety of the state's highways.

I. The California Supreme Court Correctly Held That All Motorists Must Comply With Section 20002(a)

In the decision below the California Supreme Court held that all motorists must comply with section 20002(a) of the California Vehicle Code. Under that statute any driver involved in an accident resulting in property damage must stop at the scene of the accident. If he can locate the owner or person in charge of the property damaged, he need only give to that individual his name and the automobile owner's name and address. If he cannot locate that person, he must leave a written notice giving that same information and a statement of circumstances on the property damaged and notify the local law enforcement officials of the accident.

Undoubtedly the latter requirements were enacted to make sure that the owner or person in charge of unattended property could contact the driver by consulting the note, or if it was lost or destroyed, such officials.

Section 20002(a) of the California Vehicle Code is one part of the California statutory plan for the orderly use of its highways. Other provisions impose a similar duty upon a driver to stop and identify himself and render aid and assistance where death or injury to the person has occurred. (California Vehicle Code, Sections 20001, 20003-20004). There are other provisions which require written accident reports to be filed where the amount of property damage involved is more than $200, or where death or injury has occurred (Calif. Veh. Code, §§ 20008-20009; and see the California Financial Responsibility Law set forth in Calif. Veh, Code §§ 16000, et seq.).

The requirement that a driver must stop and identify himself was imposed in California as early as 1905 when automobile travel was first beginning to be a common mode of travel (see Stats. 1905, Ch.612, p.818; § 3(5); see also Penal Code § 367(c), repealed, Stats. 1935, Ch.27, § 802, p.247). Since its inception in 1926 the Uniform Vehicle Code has contained similar provisions requiring drivers involved in accidents to stop and identify themselves (UVCA §§ 10-101—10-105). Today, all states and the District of Columbia have laws requiring drivers involved in an accident to stop and identify themselves (See Annotations UVCA §§ 10-102(a), 10-103, 10-104(a), 10-105).

It appears that all jurisdictions provide in some way for accidents involving damage to attended vehicles or property (Annotation, UVCA 10-103, at 34-37). As to accidents involving damage to unattended property, it appears that the laws of 43 jurisdictions expressly require the driver to stop and identify himself, while that duty may be inferred from the laws of most other jurisdictions (Annotation UVCA

§ 10-105, at 50-55). The provisions contained in the Uniform Vehicle Code (UVCA § 10-103, 10-105) and the provisions of section 20002(a) are in substantial accord.[4]

The California Supreme Court was correct in holding that all motorists must comply with section 20002(a). Section 20002(a) is constitutional as enacted. Thus, "hit-and-run" statutes which require a driver to stop and identify himself or to render aid and assistance, serve to insure that persons injured are given necessary aid and care. *People v. Scofield,* 203 Cal. 703, 708, 265 Pac. 914, 916 (1928). They also serve to protect property owners against financial loss. *People v. Stansberry,* 242 Cal.App.2d 199, 203, 51 Cal. Rptr. 403, 406 (1966); *Miglierini v. Havemann,* 240 Cal. App.2d 570, 573, 49 Cal.Rptr. 795, 797 (1966). Undoubtedly, too, if such statutes did not exist and compliance was not required, the remedy of "self-help" would soon become the order of the day.

Indeed, it may be asserted that both drivers and non-drivers alike have always viewed a requirement that a driver stop and identify himself or render aid and assistance as reasonable and necessary and as constituting the minimum acceptable standard for drivers involved in an accident. Such statutes are regarded as having a moral content and a universal public acceptance as being fair. Today, with the ever increasing number of automobiles on the highways

4. Thus, the Uniform Vehicle Code requires that a driver involved in an accident resulting in property damage must stop and identify himself. If the property is unattended, he must leave a note and notify the police. Although the note need not set forth the circumstances of the accident, it must give the driver's name and address and the registration number of the vehicle he is driving.

and the attendant dangers, the need for such statutes is as great as it ever was and probably more so.[5]

As a result of considerations such as these, "hit-and-run" statutes have been uniformly upheld since their inception, despite the claims of self-incrimination which have been made. Before this Court's decision in *Malloy v. Hogan*, 378 U.S. 1 (1964), holding the Fifth Amendment privilege against self-incrimination to be applicable to the states, the constitutionality of "hit-and-run" statutes had been upheld in such decisions as:

Commonwealth v. Joyce, 326 Mass. 751, 97 N.E.2d 192 (1951); *Ule v. State*, 208 Ind. 255, 194 N.E. 140 (1935); *People v. Rosenheimer*, 209 N.Y. 115, 102 N.E. 530 (1913); *People v. Thompson*, 259 Mich. 109 242 N.W. 857 (1912); *State v. Sterrin*, 78 N.H. 220, 98 A. 482 (1916); *Ex parte Kneedler*, 243 Mo. 632, 147 S.W. 983 (1912); and *State v. Razey*, 129 Kan. 328, 282 P. 755 (1929).

In California, "hit-and-run" statutes had been previously upheld in *People v. Diller*, 24 Cal.App. 799, 142 P. 797 (1914); and *People v. Fodera*, 33 Cal.App. 8 164 P.22 (1917); and

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5. In support of this proposition, it may be noted that the 1969 edition of "Accident Facts" published by the National Safety Council, reports that in 1968 there were 46,800 fatal automobile accidents in the United States resulting in 55,200 deaths. "Accident Facts" also reports that there were 1,300,000 injury accidents resulting in 2,000,000 injuries; and, that there were 13,300,000 reported property damage accidents resulting in an estimated property damage cost of $3,800,000. Combined with an estimated cost of injuries and insurance costs, the total estimated costs for motor-vehicle accidents in 1968 was $11,300,000. Thus, the necessity for the continued enforcement of "hit-and-run" statutes would seem clear. National Safety Council, Accident Facts at 3-5, 40 (1969 Ed).

cf. *People v. McCormick,* 102 Cal.App.2d Supp. 954, 963-964, 228 P.2d 349, 355 (1951).[6]

Only in *Rembrandt v. Cleveland,* 28 Ohio App. 4, 161 N.E.2d 364 (1927), had a state court declared its "hit-and-run" statute unconstitutional. However, the court did so on the ground that the particular statute involved required a full report concerning all details of the accident. The Court specifically stated that another "hit-and-run" statute could be drafted which would be constitutional.

Decisions since *Malloy v. Hogan, supra,* had also rejected claims of compulsory self-incrimination. Thus, in *People v. Limon,* 252 Cal.App.2d 575, 60 Cal. Rptr. 448 (1967) and *People v. Bammes,* 265 Cal.App.2d, 626, 71 Cal. Rptr. 415 (1968), California lower courts had held that the privilege against self-incrimination was not infringed by requiring compliance with the personal injury "hit-and-run" statute. (Calif. Veh. Code § 20001). In *State v. Lemme,* 107 N.H. 437, 244 A.2d 585 (1968) the Rhode Island Supreme Court held, inter alia, that since the defendant had not complied with a "hit-and-run" statute similar to section 20002, the defendant could not claim that compliance with the statute would have resulted in self-incrimination as to him. Similarly, in *People v. Lucas,* 41 Ill.2d 370, 243 N.E.2d 228 (1968) the Illinois Supreme Court had held that "using the standard of *Marchetti v. United States,*" 390 U.S. 39 (1968), a statute which required the driver to disclose his name and address, the registration number of his vehicle, and upon proper request, his driver's license, did not "present a substantial and real hazard of incrimination".

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6. Indeed, it may be noted that in the *McCormick* case the Court struck down a Communist Party registration statute, on the ground that it violated the privilege against self-incrimination, as this Court later did under the Fifth Amendment in *Albertson v. SACB,* 382 U.S. 70 (1965). However, in the *McCormick* case, the Court specifically recognized that a requirement that a driver stop at the scene of an accident and give his name and address was an entirely different matter, and that this requirement did not violate the privilege against self-incrimination.

Thus, to the extent that the decision below holds that all motorists must comply with section 20002(a), it is correct and in the mainstream of judicial authority. However, the decision below is totally incorrect to the extent that it also holds that compliance with section 20002 may violate the Fifth Amendment privilege against self-incrimination.

In reaching that decision the Court did not find any particular provision of section 20002 to be unconstitutional. Accordingly the constitutional arguments that might be considered with respect to any particular requirement imposed by section 20002 need not be considered here.[7] However, what the Court did hold is that the Fifth Amendment privilege against self-incrimination does apply whenever a driver is required to stop and identify himself and reasonably believes that to do so will result in self-incrimination. Thus, the Court stated that:

> "We are satisfied that the privilege is applicable when a driver of a motor vehicle involved in an accident is confronted with a statutory requirement to stop and divulge his identity and reasonably believes

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7. For example, in *State v. Lemme*, 107 N.H. 437, 244 A.2d 585 (1968) the defendant had argued that to leave a note giving a "statement of circumstances" on unattended property, violated the Fifth Amendment privilege against self-incrimination. In rejecting that argument, the Court stated:

"We do not perceive that the required statement calls for information so detailed as to suggest, let alone admit, that the collision was the result of conduct amounting to a misdemeanor. Rather, we believe, and so hold, that the requirements of a statute are met by leaving a statement written in the English language which acknowledges participation in the collision, together with the names and addresses of the driver and the owner of the colliding vehicle. With its use of the phrase 'circumstances of the collision,' the legislature was suggesting to the colliding operator such additional information as to him might seem pertinent. It could not and did not intend to require criminal self-incrimination."

that compliance with the statute will result in self-incrimination." (A. 66).

In reaching that conclusion, the Court created an "extravagant extension of the Fifth Amendment." *Holt v. United States,* 218 U.S. 245, 252-253 (1910); *United States v. Wade,* 388 U.S. 218, 222 (1967). It is our position that the privilege against self-incrimination is not infringed by the minimal duty imposed by section 20002(a) requiring any driver to stop at the scene of an accident and to give his name and address.

II. The Privilege Against Self-Incrimination Does Not Apply to a Statutory Requirement That a Driver Involved in an Accident Resulting in Property Damage Must Stop and Identify Himself

A. COMPLIANCE WITH SECTION 20002(a) DOES NOT CREATE A SUBSTANTIAL HAZARD OF SELF-INCRIMINATION

The scope of the Fifth Amendment privilege has traditionally been "confined to real danger, and does not extend to remote possibilities out of the ordinary course of law". *Heike v. United States,* 227 U.S. 131, 144 (1913). "The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real' and not merely trifling or imaginary, hazards of incrimination." *Marchetti v. United States,* 390 U.S. 39, 53 (1968).

Compliance with section 20002(a) does not create a substantial hazard of self-incrimination. Thus, section 20002 (a) requires that all drivers involved in an accident resulting in property damage must stop at the scene of the accident and leave their name and address. It is not a crime to be involved in an accident, and the fact that a motor vehicle has been damaged does not mean that a crime is involved. By its terms, section 20002(a) requires all drivers

to stop, regardless of fault. If a crime is involved and a particular driver at fault, this must be established from other facts. As section 20002 is directed to all drivers who might chance to be involved in an accident, neither the requirement to stop or to give a name and address tends to establish guilt.

In many cases compliance with section 20002(a) may be achieved without any knowledge or involvement by the state. In the case of attended property, a driver need only stop and give his name and address to the other driver involved. On the other hand, when a driver who has caused damage to unattended property must notify public officials of the accident, there is no requirement that he go to the police station to do so. Indeed, should the state later learn of the accident or become otherwise involved in the matter, this Court's decision in *Miranda v. Arizona,* 384 U.S. 436 (1966) fully serves to protect against self-incrimination.

Thus, while the *Miranda* decision specifically approves general on-the-scene questioning, it also points out that the privilege against self-incrimination is jeopardized "when an individual is taken into custody or otherwise deprived of his freedom by the authorities and is subjected to questioning." *Miranda v. Arizona,* at 478. When that stage is reached, *Miranda* warnings must be given and a waiver of rights obtained before any statement made may be used in evidence.

The Court below has now extended the *Miranda* decision by holding that the Fifth Amendment privilege against self-incrimination is applicable whenever a driver involved in an accident must stop and give his name and address and reasonably believes that in doing so, self-incrimination will result. How it is to be determined whether the driver's fear of self-incrimination is reasonable, is a matter which is not spelled out in the decision below.

Indeed, the decision below is inconsistent with other decisions of this Court holding that a police officer may stop a citizen under circumstances other than probable cause without violating the Constitution. *Terry v. Ohio*, 392 U.S. 1 (1968). Thus, an officer may make reasonable inquiries and where necessary, conduct a "pat-search". In the present case Byers could have been required to stop by a policeman rather than by a "hit-and-run" statute. Nevertheless, under the decision below, if Byers had stopped and given his name and address and at the time reasonably believed that compliance would result in self-incrimination, this information, too, would fall within the scope of the privilege against self-incrimination and become automatically immunized. Similarly, if instead of driving unsafely, Byers had been driving without a license or in a stolen car, his failure to present a license or to present proper registration for the car, would constitute compulsory self-incrimination if the decision below is correct. Consequently, this information too could not be used in any subsequent criminal proceeding. We submit that the Fifth Amendment does not require this result.

Nevertheless, it has been argued throughout these proceedings that the privilege against self-incrimination is violated because the state might eventually learn the identity of the driver if he is required to comply with section 20002. The argument has been made that this knowledge plus proof of a crime may lead to a criminal prosecution. However, while knowledge of a driver's identity and the initiation of a criminal prosecution are several steps removed, this contention, in any event, ignores that the privilege against self-incrimination does not guarantee anonymity. *Schmerber v. California*, 384 U.S. 757 (1966); cf. *Minor v. United States*, 396 U.S. 87, Ftn. 3 at 91 (1969). This

contention also ignores that the privilege against self-incrimination does not provide a constitutional right to escape from official attention.

This point was made in *United States v. Sullivan*, 274 U.S. 259 (1927). There a taxpayer sought to avoid filing an income tax return on the ground that he had earned his income illegally. In rejecting the privilege against self-incrimination as a defense to the charge of wilful failure to file an income tax return, the court concluded that most of the questions on the return would not have compelled the taxpayer to make incriminating disclosures and that accordingly it would be an "extreme if not extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime." Id, at 263-264.

The *Sullivan* case suggests that while there may be a point at which the privilege against self-incrimination may apply to any information given in the course of a regulatory program, the privilege does not apply at the threshold.

B. A REQUIREMENT THAT A DRIVER MUST STOP AND GIVE HIS NAME AND ADDRESS IS NON-TESTIMONIAL IN NATURE AND THEREFORE NOT WITHIN THE SCOPE OF THE PRIVILEGE AGAINST SELF-INCRIMINATION.

If section 20002(a) required only that a driver must stop, we submit that, as a course of conduct, that requirement would not fall within the scope of the privilege against self-incrimination. It is non-testimonial in nature. Indeed, if the fact that a driver stops should be considered testimonial in nature, it is testimony of innocence and not of guilt. For it is when a driver does not stop that his flight may be considered as a circumstance tending to show guilt. *People v. Brooks*, 64 Cal.2d 130, 138, 48 Cal.Rptr. 879, 885, 410 P.2d 383, 389 (1966); cf. *E. J. Willig Truck Transp. Co.*, 40 Cal.2d 669, 676, 255 P.2d 802, 806-807 (1953).

The further duty imposed by the state—to give a name and address—is for identification purposes only, and evidence which serves only to identify is also considered non-testimonial in nature.

For example, an accused may be fingerprinted, photographed, and measured without his consent; blood samples may be taken from his person if the means used to obtain them do not shock the conscience. *Schmerber v. California,* 384 U.S. 757 (1966). Similarly, he may be required to stand in a courtroom or to answer if he is the defendant named in the indictment. *Peoples v. United States,* 365 F.2d 284 (10th Cir. 1966); *Swingle v. United States,* 151 F.2d 512, 513 (10th Cir. 1945). A defendant may also be required to give a handwriting exemplar, *Gilbert v. California,* 388 U.S. 263, 265-267 (1967), or be compelled to speak in a line-up for voice identification, *United States v. Wade,* 388 U.S. 218, 221-223 (1967). These kinds of evidence have been considered to be non-testimonial in nature, and as such, they do not fall within the privilege against self-incrimination. *Schmerber v. California, supra.*

Accordingly, if a "hit-and-run" statute required a driver to stop and to leave a fingerprint, these acts would not be considered to be testimonial, and within the scope of the privilege. When, on the other hand, a driver has only to leave his name and address, this course of conduct also should not be considered to be testimonial in nature and within the scope of the privilege.

C. COMPLIANCE WITH SECTION 20002 DOES NOT UNDERCUT THE VALUES UPON WHICH THE PRIVILEGE AGAINST SELF-INCRIMINATION RESTS.

The requirement that a driver must stop at the scene of an accident and furnish his name and address does not undercut the values upon which the privilege against self-incrimination rests.

As the Court stated in *Miranda v. Arizona, supra,* at p. 460, "All these policies point to one overriding thought: the Constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government to 'shoulder the entire load' .... to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth."

However, these values are not infringed by requiring compliance with section 20002. The policies underlying the privileges are not infringed (1) because compliance with section 20002(a) must be made on the spot, if at all, and (2) because the information given is so general in nature. Thus, in requiring a driver to stop and to give his name and address, there is no danger that the police and prosecuting officials will be encouraged to rely on a driver's self-disclosure, rather than seeking themselves to produce evidence of crime through their own independent labors.

Indeed, the fact that compliance with section 20002(a) can only be achieved "on-the-spot", if at all, serves to demonstrate the state's difficulty in proving that any evidence it has produced through its own labors is, nevertheless, "untainted." The Court below has stated that:

> "... we must, in order to fulfill our responsibility to protect the privilege against self-incrimination, hold that where compliance with section 20002 of the Vehicle Code would otherwise be excused by an assertion of the privilege, compliance is, as in other cases, mandatory and state prosecuting authorities are precluded from using the information disclosed as a result of compliance or its fruits in connection with any criminal prosecution related to the accident." (A. 79).

However, compliance with section 20002(a) requires a driver to stop, as well as to give his name and address. Is information derived from the fact that a driver stopped also rendered inadmissible by the Court's decision? For example, if a driver does stop at the scene of an accident, and a policeman should arrive and administer a test to determine sobriety, are the results of that test to be classified as "fruits" of the driver's compliance with section 20002(a)? Are the results of this test inadmissible even though they have been otherwise held to fall outside the scope of the privilege against self-incrimination? *Schmerber v. California, supra.* On the other hand, if the state can show that the driver stopped, not because of the "hit-and-run" statute, but because his car was so badly damaged that it could not be driven any farther, does evidence of the driver's identity and the results of such tests then become admissible? The difficulties raised by the decision of the Court below only serve to emphasize its erroneous nature.

III. The Court Below Extended the Holdings of the Albertson-Marchetti-Grosso-Haynes cases Beyond Anything Ever Suggested by Those Decisions.

In reaching its decision the Court below appeared to rely on this Court's decisions in *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965); *Marchetti v. United States,* 390 U.S. 39 (1968); *Grosso v. United States,* 390 U.S. 62 (1968); and *Haynes v. United States,* U.S. 390 U.S. 85 (1968). However, the Court extended the holdings of those cases beyond anything ever suggested by those decisions.

Thus, in the *Albertson* case this Court was concerned with a statutory scheme whereby Communist Party members were required to register as such and to file information regarding their membership with the Attorney General. This Court previously had held that mere association with the Communist Party presented a sufficient threat

of prosecution to support a claim of privilege. *Patricia Blau v. United States*, 340 U.S. 159 (1950); *Irving Blau v. United States*, 340 U.S. 332 (1950); *Brunner v. United States*, 343 U.S. 918 (1950); *Quinn v. United States*, 349 U.S. 155 (1955).

Similarly, *Marchetti* and *Grosso* presented comprehensive statutory schemes where, by the very act of filing wagering tax forms and paying the wagering tax, the registrants were admitting that they were presently engaged in unlawful conduct or that they planned to do so in the future. Gambling in one form or another was shown to be illegal in all 50 states. In *Haynes*, the very act of registering would have constituted a direct admission that an unregistered firearm was acquired in violation of the National Firearms Act. It was the "uncommon" case where compliance with the statute did not involve *per se* illegality. The more recent decision of this Court in *Leary v. United States*, 395 U.S. 6 (1969), dealing with the Marijuana Tax Act, presented the same kind of dilemma, whereby the potential registrant was faced with a "choice between the rock and the whirlpool."

As this Court pointed out in each of these cases, the statutory requirements involved were directed "unmistakably" to persons "inherently suspect of crime" in areas "permeated with criminal statutes." Whatever the ostensible purpose, it was clear that a comprehensive scheme had been established in each case primarily to secure convictions. As the Court stated in *Marchetti*, "in these circumstances, it can scarcely be denied that the obligations to register and pay the occupational tax created for petitioner 'real and appreciable' and not merely 'imaginary and insubstantial' hazards of self-incrimination." *Marchetti v. United States*, supra, at 48.

The statutory requirements of section 20002(a) do not begin to approach this kind of situation.

Thus, a requirement under which any driver involved in an accident must stop at the scene of the accident and give his name and address, is not a requirement directed "unmistakably" to persons "inherently suspect of crime." It is not a crime to be involved in an accident. Section 20002 does not require that only drivers at fault must stop, but it requires all drivers who might chance to be in an accident resulting in property damage to stop.

Similarly, it is unrealistic to characterize driving as an area "permeated with criminal statutes." There are to be sure, criminal statutes which remain to be enforced, and must be enforced, if the goal of highway safety is to be sought. Thus, for example, it is a criminal offense to drive under the influence of liquor or narcotics (Calif. Veh. Code, § 23102, 23105). On the other hand, there has been a trend toward classifying many traffic offenses as infractions only. (Calif. Veh. Code § 40000).

Nevertheless, the Fifth Amendment does not bar from evidentiary use all information that may be acquired in the course of a governmental regulatory program. The Court made this distinction clear when, in *Marchetti, Grosso* and *Haynes* it carefully distinguished the decisions of *United States v. Sullivan, supra,* dealing with the filing of income tax returns, and *Shapiro v. United States,* 335 U.S. 1 (1948), embodying the required records doctrine. Thus, the Court in *United States v. Sullivan, supra,* had held that the privilege against self-incrimination did not excuse a taxpayer from filing an income tax return even if he had earned his money illegally.

Similarly, in *Shapiro v. United States,* 335 U.S. 1 (1948) the Court held that neither an immunity statute nor the Fifth Amendment privilege barred compliance with a sub-

poena for the production of records required to be kept by the Office of Price Regulation, even though such information was later used in a criminal proceeding. In both the *Shapiro* and *Sullivan* cases, as here, the statutes were neutral on their face, and their enforcement had overriding "public aspects" which the *Albertson-Marchetti-Grosso-Haynes* cases did not.

As Mr. Justice Brennan noted in his concurring opinion in *Grosso v. United States,* 390 U.S. 72 at 73:

> "United States v. Sullivan, supra, makes clear that an individual is not exempted, by the fact that he may be privileged to refuse to answer some questions, from a requirement, 'directed at the public at large,' of filing an income tax return exclusively containing questions 'neutral on their face.' Albertson v. SACB, 382 U.S. 70, 79. Shapiro v. United States, supra, involved a similar situation; it involved a record-keeping requirement pursuant to a neutral governmental system of price regulation."

In *Sullivan* and *Shapiro,* as here, the inquiries made are directed to the "public at large" and involve essentially "neutral" information.[8]

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8. See also *Warszower v. United States,* 312 U.S. 342 (1941) (Information demanded on registration draft form revealed that defendant was an alien who entered the country illegally); *United States v. Walden,* 411 F.2d 1109 (4th Cir. 1969) cert. den. 396 U.S. 931 (1969) (The Fifth Amendment privilege against self-incrimination is not a defense to charges of violations of provisions of the internal revenue code requiring the bonding of a distillery and designation of place of manufacture); *People v. Mendoza,* 251 Cal.App.2d 835, 60 Cal. Rptr. 5 (1967) (Use of information as to identity derived from identification cards for aliens habitually crossing the international border not within the privilege against self-incrimination where defendant was charged with possession by an alien of a concealable firearm); *United States v. Olson,* 253 Fed. 233 (W.D. Wash. 1917) (Failure to exhibit registration certification for draft when called upon by police officer to do so held not to violate the privilege against self-incrimination.)

IV. Assuming Arguendo That the Privilege Against Self-Incrimination Does Apply to the Requirements Imposed by Section 20002, Use of the Information and Its Fruits in any Criminal Proceeding Is Required Because of the Overriding and Compelling State Interest.

Assuming arguendo that the privilege against self-incrimination does apply to a requirement that a driver must stop and give his name and address, the state has an overriding and compelling state interest both in demanding compliance with the statute and in enforcing its criminal laws. As noted, supra, at page 10, section 20002 was enacted to protect property owners against financial loss. This has been recognized as a valid state measure by this Court in *Kesler v. Department of Public Safety*, 369 U.S. 153 (1962) wherein this Court upheld the Utah Financial Responsibility Law.

On the other hand, the state has an equally compelling interest in adopting and enforcing stringent measures to protect the interests of drivers and pedestrians alike in an effort to assure highway safety. This interest also was recognized by the Court as early as 1927 when in the course of upholding a "non-resident" motorist statute, the Court stated in *Hess v. Pawloski*, 274 U.S. 352, 356 (1927):

> "Motor vehicles are dangerous machines; and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the State may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways. The measure in question operates to require a non-resident to answer for his conduct in the State where arise causes of action alleged against him, as well as to provide for a claimant a convenient method by which he may sue to enforce his rights."

While the Court below has held that all motorists must comply with section 20002, it has, on the other hand, made

the state's ability to enforce its criminal laws difficult, if not impossible. Compliance with section 20002 must be made on the spot, if at all. Under the decision below when a driver stops in compliance with section 20002, he apparently not only automatically immunizes the particular words he is required to speak (i.e. his name and address) but also the fact that he has stopped and the fruits of that stopping. Even if there are 20 witnesses to the accident is it still possible to say that the state did not learn the driver's identity because he stopped? As a practical matter, the Court below has not only granted "use" immunity, but has totally and automatically immunized the conduct of a driver who is driving in a criminal fashion.

In the area of driver regulation and highway safety this result is untolerable. It is because automobiles are "dangerous instrumentalities" that the state requires that only qualified persons may be licensed to drive. It is because automobiles are "dangerous instrumentalities" that the state also exercises its right to suspend and revoke licenses where negligent or criminal driving is involved. It is because automobiles are "dangerous instrumentalities" that the duty to stop and to identify oneself or to render aid and assistance must be required of all drivers, regardless of who caused the accident or why.

Accordingly, for the reasons previously stated, we respectfully submit that the privilege against self-incrimination is not violated by requiring compliance with section 20002. However, if the privilege against self-incrimination is applicable, information disclosed as to name and address is general enough, and the interest of the state compelling enough to hold that this infringement is the price that must be paid for the orderly use and safety of the state's highways. As the Court noted on another occasion, in

United States v. O'Brien, 391 U.S. 367, 376-77 (1968), (the "draft-card burning" case):

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non speech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the supression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. [Footnotes omitted.]"

If compliance with section 20002 does infringe the privilege against self-incrimination, we respectfully submit that it is an incidental restriction at most. A requirement to stop and identify oneself must be sustained and that information must used in a criminal proceeding. This requirement may be validly sustained as the price to be paid for the safety and the orderly use of a state's highways.

CONCLUSION

For the foregoing reasons we respectfully submit that the privilege against self-incrimination does not apply to the requirement set forth in section 20002(a) that a driver involved in an accident resulting in damage to property must stop and identify himself. Accordingly, the decision of the Court below holding that information derived from compliance with section 20002 or its fruits must be barred from use in any criminal proceeding was erroneous. If the privilege against self-incrimination does apply to even the minimal requirement imposed by section 20002 that a driver must stop and identify himself, the state has an overriding and compelling state interest both in demanding compliance with the statute and in using the information derived in any criminal prosecution arising from the accident. Accordingly, we respectfully submit that it was not unfair to charge the respondent Byers with failure to stop at the scene of the accident in violation of section 20002 and that the decision of the Court below should therefore be reversed.

Dated: San Francisco, California
June 12, 1970

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(Appendix Follows)

Appendix

UNITED STATES CONSTITUTION

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CALIFORNIA VEHICLE CODE

Duty Where Property Damaged

20002. (a) The driver of any vehicle involved in an accident resulting in damage to any property including vehicles shall immediately stop the vehicle at the scene of the accident and shall then and there either:

(1) Locate and notify the owner or person in charge of such property of the name and address of the driver and owner of the vehicle involved, or;

(2) Leave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver and of the owner of the vehicle involved and a statement of the circumstances thereof and shall without unnecessary delay notify the police department of the city wherein the collision occurred or, if the collision occurred in unincorporated territory, the local headquarters of the Department of the California Highway Patrol.

Any person failing to stop or comply with said requirements is guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in the county jail for not to exceed six months or by a fine of not to exceed five hundred dollars ($500) or by both.
(Stats. 1965, ch. 872, § 3)

§ 21750. Overtake and Pass to Left. The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left at a safe distance without interfering with the safe operation of the overtaken vehicle, subject to the limitations and exceptions hereinafter stated. [Amended by Stats. 1961 ch. 577 § 1.]

UNIFORM VEHICLE CODE

§ 10-101—Provisions of chapter apply throughout State

The provisions of this chapter shall apply upon highways and elsewhere throughout the State.

§ 10-102—Accidents involving death or personal injury

(a) The driver of any vehicle involved in an accident resulting in injury to or death of any person shall immediately stop such vehicle at the scene of such accident or as

close thereto as possible but shall then forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled the requirements of § 10-104. Every such stop shall be made without obstructing traffic more than is necessary.

(b) Any person failing to stop or to comply with said requirements under such circumstances shall, upon conviction, be punished by imprisonment for not less than 30 days nor more than one year or by fine of not less than $100 nor more than $5,000, or by both such fine and imprisonment.

(c) The commissioner shall revoke the license or permit to drive and any nonresident operating privilege of the person so convicted.

§ 10-103—Accidents involving damage to vehicle or property

The driver of any vehicle involved in an accident resulting only in damage to a vehicle or other property which is driven or attended by any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible, but shall forthwith return to and in every event shall remain at the scene of such accident until he has fulfilled the requirements of § 10-104. Every such stop shall be made without obstructing traffic more than is necessary. Any person failing to stop or comply with said requirements under such circumstances shall be guilty of a misdemeanor and, upon conviction, shall be punished as provided in § 17-101. (REVISED 1962.)

§ 10-104—Duty to give information and render aid

(a) The driver of any vehicle involved in an accident resulting in injury to or death of any person or damage to any vehicle or other property which is driven or attended by any person shall give his name, address and the registration number of the vehicle he is driving, and shall upon

request and if available exhibit his license or permit to drive to any person injured in such accident or to the driver or occupant of or person attending any vehicle or other property damaged in such accident and shall give such information and upon request exhibit such license or permit to any police officer at the scene of the accident or who is investigating the accident and shall render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that such treatment is necessary, or if such carrying is requested by the injured person.

(b) In the event that none of the persons specified are in condition to receive the information to which they otherwise would be entitled under subdivision (a) of this section and no police officer is present, the driver of any vehicle involved in such accident after fulfilling all other requirements of § 10-102 and subdivision (a) of this section, insofar as possible on his part to be performed, shall forthwith report such accident to the nearest office of a duly authorized police authority and submit thereto the information specified in subdivision (a) of this section. (SECTION REVISED 1962.)

§ 10-105—Duty upon damaging unattended vehicle or other property

The driver of any vehicle which collides with or is involved in an accident with any vehicle or other property which is unattended resulting in any damage to such other vehicle or property shall immediately stop and shall then and there either locate and notify the operator or owner of such vehicle or other property of his name, address and the registration number of the vehicle he is driving or shall attach securely in a conspicuous place in or on such vehicle or other property a written notice giving his name, address and the registration number of the vehicle he is driving and shall without unnecessary delay notify the nearest office of a duly authorized police authority. Every such stop shall be made wihtout obstructing traffic more than is necessary. (REVISED, 1968.)